THE DASCHLE GROUP
A PUBLIC POLICY ADVISORY OF BAKER DONELSON

February 11, 2022

Jennifer Kennedy Gellie
Chief, FARA Unit
Counterintelligence and Export Control Section
National Security Division
U.S. Department of Justice
175 N Street NE
Constitution Square, Building 3—Room 1.100
Washington, DC 20002

RE: RIN 1105–AB67 / NSD Docket No. 102

Ms. Gellie,

Thank you for the opportunity to respond to the Advanced Notice of Proposed Rulemaking (ANPR), *Clarification and Modernization of Foreign Agents Registration Act (FARA) Implementing Regulations*.

As a lawyer that has been working on FARA matters for nearly 15 years, I strongly support the Department's goal of amending and updating the FARA regulations. Historically, FARA practitioners have relied strongly on hypothetical, non-binding guidance provided by FARA attorneys and staff, frequently by phone. While this level of engagement is enormously helpful – and necessary, given the wide array of scenarios that the original drafters of FARA could never have anticipated – amending the FARA regulations to provide additional clarity in key areas would provide practitioners and their clients with greater certainty and likely increase overall compliance.

Below please find comments on select questions in the ANPR that align with my experience as a lawyer advising clients on FARA compliance. These comments are provided in the context of my personal capacity and do not reflect the views of any other person or organization.

*Question 2: Should the Department issue new regulations to clarify the meaning of the term "political consultant," including, for example, by providing that this term is generally limited to those who conduct "political activities," as defined in 22 U.S.C. 611(o)?*

I urge the Department to clarify that the definition of "political consultant" applies only to those who conduct "political activities." There is strong legislative history supporting this interpretation.

The definition of a "political consultant" has been an area of great confusion among FARA practitioners for many years, in part due to the Department's 1989 letter to Henry Kissinger noting that "the Department has consistently interpreted the term 'political consultant'…to mean any person who takes steps beyond merely advising the foreign principal, such as

901 K STREET, N.W. | SUITE 900 | WASHINGTON, D.C. 20001
202.508.3400 | FAX 202.508.3402
www.daschlegroup.com

arranging meetings with U.S. Government officials on its behalf or accompanying the principal to such meetings." However, the Department has given inconsistent signals over the years as to whether this interpretation is still valid. Given the criminal penalties tied to FARA violations, additional clarity is needed.

Because FARA, unlike the Lobbying Disclosure Act (LDA), contains no threshold related to a practitioner's time or payment, the effect of the current rule is to expand registration requirements far more than the original drafters likely intended. For example, I first registered for FARA as a law student working for a D.C. firm that represented foreign clients after I accepted an assignment to write a research memo on a U.S. law for a foreign client. I never spoke to the client directly nor did any outreach on their behalf. It is hard to imagine that this was what was originally envisioned by FARA's drafters, and yet, registration would seem to be required under the current statutory language and guidance.

Additionally, because the current definition of "political consultant" is so wide-reaching, it is virtually certain that hundreds, if not thousands, of individuals are currently in violation without ever realizing their registration obligations. This puts those few individuals that do register at a disadvantage, given the burden of registration and quarterly reporting. Clarifying that the definition of "political consultant" includes only those who conduct political activities will level the playing field and provide much-needed clarity as to the law's applicability.

Finally, I strongly urge the Department to make clear that the definition applies only to those who conduct political activities rather than stating that the definition is "generally limited" to those who conduct political activities. The term "generally limited" is vague and will not provide the certainty needed for compliance. I would not feel comfortable advising a client that did not conduct political activities to defer registration if the language was amended in this way.

*Question 3: Should the Department issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises? If so, how should the Department amend the regulation to address when such activities do not serve ''predominantly a foreign interest''?*

It would be very helpful if the Department could issue a regulation addressing how 22 U.S.C. 613(d)(2) applies to political activities on behalf of foreign principals other than state-owned enterprises. In particular, it would be helpful to clarify how this exemption is distinguished from the LDA exemption (beyond the simple fact of LDA registration). To address when activities do not serve "predominately a foreign interest," the Department might look to whether there is direct involvement by the foreign government, coordination between the foreign principal and the foreign government related to the political activities, and whether the foreign principal has a legitimate commercial interest in the political activity.

*Question 9: Are there other aspects of the statutory exemptions that the Department should clarify, whether to make clear additional circumstances in which registration is, or is not, required?*

I strongly urge the Department to clarify the scope of the LDA exemption. Current FARA regulations clarify that the LDA exemption is not available "where a foreign government or

foreign political party is the principal beneficiary."[1] However, a recent Advisory Opinion notes that "there are situations in which a foreign government or political party may not be *the* principal beneficiary, but *a* principal beneficiary of lobbying activities in which the LDA exemption would not apply."[2]

This Advisory Opinion has engendered enormous confusion among FARA practitioners. While it is relatively straightforward to determine whether a foreign government or political party is *the* principal beneficiary of lobbying activities, the Department has provided no guidance on scenarios in which a foreign government or political party would be "*a* principal beneficiary of lobbying activities."

Foreign corporations and organizations often advocate before the U.S. government on matters that impact their commercial interests but also implicate the interests of their local governments. For example, the ability of foreign corporations to do business in the U.S. is often directly impacted by U.S. fiscal policy and diplomatic relations vis-à-vis corporations' home countries. The Advisory Opinion casts doubt as to whether actions by these foreign corporations to reverse U.S. policy that is impacting their commercial interests would be ineligible for the LDA exemption because a foreign government could be seen as "*a* principal beneficiary" of that activity – even in the absence of any coordination or communication with the government.

I strongly urge the Department to remove this confusion and clarify – through regulation or subregulatory guidance – that the LDA exemption applies where a foreign government or foreign political party is "the" – not "a" – principal beneficiary. If the Department instead believes that the LDA exemption should be narrowed further in accordance with the Advisory Opinion, I urge the Department to amend current regulations to clarify precisely what factors should be considered to determine whether a foreign government or political party is "a" primary beneficiary of lobbying activities.

*Question 10: Should the Department revise 28 CFR 5.2(i) to allow the National Security Division longer than 30 days to respond to a Rule 2 request, with the time to begin on the date it receives all of the information it needs to evaluate the request? If so, what is a reasonable amount of time?*

Because FARA has a very short window for registration, a potential foreign agent is frequently in the position of needing to wait for an Advisory Opinion before proceeding with any meaningful interactions with a foreign entity. As such, I recommend that the Department keep the current 30-day rule, but agree it is reasonable to begin this clock on the date it receives all of the information it needs to evaluate the request. The additional clarity provided by these amendments to the FARA regulations will hopefully reduce the number of Advisory Opinion requests that the Department receives every year.

*Question 11: Should the Department include with its published Rule 2 advisory opinions the corresponding request, with appropriate redactions to protect confidential commercial or financial information, so that the public may better understand the factual context of the opinion?*

---

[1] 28 C.F.R. § 5.307 (2016).
[2] DOJ, Request for Advisory Opinion Pursuant to 28 C.F.R. § 5.2, n.17 (March 20, 2019), *available at* https://www.justice.gov/nsd-fara/page/file/1180281/download.

I have found the current process – in which the Department summarizes the request in the text of the Advisory Opinion – to provide sufficient context and do not believe that it is necessary to publish the corresponding request. If the Department does begin publishing the corresponding requests, I would urge the Department to continue the practice of summarizing the request within the Advisory Opinion as it is helpful to see the Department's understanding of the fact pattern.

*Question 13: Should the Department define by regulation what constitutes "informational materials"? If so, how should it define the term?*

It would be helpful if the Department could clarify informational materials in the context of materials sent electronically. The current statutory definition of "prints" would seem to exclude electronic documents. The statute is clear, however, that materials "in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons" are also considered informational materials. It would be helpful to understand how this definition relates to electronic mail and documents that are sent electronically. For example, the Department could clarify that only emails that are sent in the same form to two or more recipients are deemed informational materials.

*Question 17: Should the Department amend 22 CFR 5.402 to ensure that the reference to the ''foreign principal'' in the conspicuous statement includes the country in which the foreign principal is located and the foreign principal's relation, if any, to a foreign government or foreign political party; and, if so, how should the regulations be clarified in this regard?*

No. The statement is already lengthy and must note that additional information is on file with the DOJ. Information on the foreign principal's country and relation, if any, to a foreign government or political party is available in the public-facing filings, which are easy for members of the public to access.

* * *

Again, thank you for the opportunity to comment on these regulations and for your leadership in working to clarify and modernize this important statute. If you have any questions, please do not hesitate to contact me at niki@daschlegroup.com or 202-508-3451.

Best,

Nicole Carelli
Senior Vice President, The Daschle Group
Of Counsel, Baker Donelson